Supreme Court, U. S.
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In The

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-708

JAMES CONNOR OCHS and
CARLA MCKINNEY OCHS

Petitioners,

v.

THE STATE OF TEXAS

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF THE STATE OF TEXAS

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PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF THE STATE OF TEXAS

The Petitioners, James Connor Ochs and Carla McKinney Ochs, respectfully pray that a Writ of Certiorari issue to review the judgment of the Court of Criminal Appeals for the State of Texas in this case.

OPINION BELOW

The opinion of the Court of Criminal Appeals for the State of Texas is not yet reported, but is attached hereto as Appendix A.

JURISDICTION

The judgment of the Court of Criminal Appeals for the State of Texas was entered on September 20, 1976. Leave to File a Motion for Rehearing was denied without written opinion on October 20.

1976 (Appendix B). The jurisdiction of this Court is invoked under 28 U.S.C. section 1257 (3).

QUESTION FOR REVIEW

Whether the marijuana seized from the home and property of the Petitioners without the authority of a search warrant was introduced into evidence at their joint trial in violation of the Fourth Amendment of the United States Constitution as applied to the States by the Fourteenth Amendment of the United States Constitution.

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Const. Amend. IV.

> "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

U.S. Const. Amend. XIV, Section 1:

> ". . . Nor shall any State deprive any person of Life, Liberty, or Property, without due process of law . . ."

STATEMENT OF THE CASE

Two to four weeks before the Petitioners' arrests, a Texas Department of Public Safety (DPS) officer received information from an Ellis County Deputy Sheriff that marijuana was being grown on land under the Petitioners' control. The DPS agent went to the location of the Petitioners' house outside of Bristol in Ellis County, Texas and began an investigation.

This included going to "different locations and different properties" by crossing several fences, not knowing on whose

land he was conducting the investigation. On one occasion, the DPS officer observed what he thought to be marijuana growing on the Petitioners' property, but he did not know if he was on the Petitioners' property.

The farmhouse in which the Petitioners were living was off by itself in a rural area with heavy foliage around it. There was a single roadway leaving the property which was the only entrance and exit, and which would allow egress from the property to be controlled.

On October 17, 1974, the DPS officer was contacted by an unnamed informant concerning a person who was to be transporting marijuana to Austin, Texas. The DPS agent received the information at approximately 10:45 a.m. He left from his location in Dallas, Texas to go to Bristol, Texas in Ellis County, where he met with the informant at 12:20 p.m. The informant advised the agent that a white male named Michael was planning to transport a large amount of marijuana from a yellow farmhouse near Bristol, Texas, to Austin, Texas. The informant also stated that Michael would be driving a green Ford pick-up, that the farmhouse was yellow in color and was owned by the Petitioners, and that Petitioner, James Connor Ochs, was a marijuana dealer who grew marijuana somewhere near the farmhouse.

The DPS agent and two other officers then proceeded in two (2) separate cars to the Petitioners' property. Two of the officers observed Petitioner, Carla McKinney Ochs, with what appeared to be marijuana stalks. They also observed a green Ford pick-up near the house. Upon approaching both the pick-up and the house, the officers observed bags in each which appeared to contain marijuana. Petitioners were then arrested. A further

search revealed growing marijuana on other parts of the property near the farmhouse. The search was conducted at approximately 1:00 p.m. on October 17, 1974.

The DPS agent testified that it was his experience that it would have taken two and one-half hours to prepare a search warrant affidavit and get a magistrate to sign it. It was stipulated that there were magistrates available who had the power to issue the warrants. It was further admitted by the DPS agent that if the pick-up was going to leave the house by the only exit, someone would have stopped it.

ISSUES RAISED BELOW

Prior to trial, Petitioners each filed two motions to suppress the evidence seized as a result of the warrantless search. (These motions are contained in the record on appeal to the Court of Criminal Appeals for the State of Texas at pages 7 and 25 for Petitioner, James Connor Ochs; and pages 7 and 26 for Petitioner, Carla McKinney Ochs). Since the joint trial was before the Court, after a waiver of the right to trial by jury, it was agreed that the Motion to Suppress would be heard at the same time as the Trial on the Merits. When the prosecution offered the marijuana seized as a result of the search, the following objection was raised:

> MR. KNIZE (Prosecutor): . . . Your Honor, at this time the State offers into evidence State's Exhibit No. 1-A, 1-B, 1-C and State's Exhibit No. 2, and also introduce State's Exhibit No. 3 and State's Exhibit No. 12.
>
> MR. WRIGHT (Counsel for Petitioners): Your Honor, even though the Court of Criminal Appeals has very recently ruled that motion to Suppress filed in advance is sufficient to reserve objection, I would still like to object on any and all grounds as set forth in my Motion to Suppress which has

> been filed previously upon the grounds and argument as set forth in the Brief to Support that Motion and I object each (sic) and every of the just numerated articles as being inadmissible as a part of the fruit of a poisonous tree . . .
>
> THE COURT: I hope its right, Mr. Wright. I will overrule the Motion to Suppress and duly note your exception on each of the grounds set out in your Motion. (contained in Statement of Facts in Record on Appeal in the Court of Criminal Appeals for the State of Texas at pages 120, 121, 126)

The Petitioners were found guilty of the offense of possession of over four (4) ounces of marijuana and sentenced to confinement for three (3) years in the Texas Department of Corrections. (Appendix C and D). The issue of the validity of the search of the Petitioners' residence and surrounding property was raised on appeal.

The Court of Criminal Appeals for the State of Texas affirmed, holding that the observations of the officers, coupled with the information from the reliable informer, furnished probable cause to conduct the search and seizure in question, citing *Draper v. United States* 358 U.S. 307 (1959); *Almendarez v. State* 460 SW 2nd 921 (Tex.Crim. App. 1970); *Buitron v. State* 519 SW 2nd 467 (Tex.Crim. App. 1975); that it would have been impracticable to secure a search warrant since the pick-up could be quickly moved out of the jurisdiction in which the warrant must be sought, citing *Carroll v. United States* 267 U.S. 132 (1925); *Brinegar v. United States* 338 U.S. 160 (1949); *Coyne v. State* 485 SW 2nd 917 (Tex. Crim. App. 1972); and that the officers had a right to enter the house and continue the search when they observed marijuana in the house, citing *Albro v. State* 502 SW 2nd 715 (Tex.Crim. App. 1973); see and cf. *United States v. Watson* _____ U.S. _____ 96 S.Ct. 820 (1976); *United States v. Santana* _____ U.S. _____ 96 S.Ct. 2406 (1976).

REASONS FOR GRANTING THE WRIT

Searches conducted outside the judicial process, without prior approval by a magistrate, are per se unreasonable, under the Fourth Amendment, subject only to a few specifically established and well delineated exceptions. *Katz v. United States,* 389 U.S. 347 (1967). The exceptions are zealously and carefully drawn, *Jones v. United States,* 357 U.S. 493 (1958), and there must be a showing by those who seek exemption that the exigencies of the situation made the course imperative. *McDonald v. United States,* 335 U.S. 451 (1948).

As shown by the testimony of the DPS agent at trial, the property owned by Petitioners had been under surveillance for some period of time. On October 17, 1974, due to the single fact that a pick-up truck was alleged to be leaving the property with marijuana, the State attempts to circumvent the requirement of securing a search warrant before searching the residence and property of Petitioners. As stated in *Johnson v. United States,* 333 U.S. 10 (1948):

> The point of the Fourth Amendment, which is not often grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime. 333 U.S. at 13-14.

There can be no clearer instance of an attempt to circumvent the requirements of a search warrant than is found in the facts of the instant case.

Three officers, in two separate cars, were at a location which had been under surveillance for over a month. Instead of sealing

off the property and not allowing anyone to leave by the only exit from the property, and obtaining a warrant, the officers made their own assessment of probable cause and began a search of the property. This search included a search of a non-moving vehicle. The Court of Criminal Appeal's opinion justifies this by citing cases dealing with the moving vehicle exception to obtaining a search warrant. *Carroll v. United States,* supra; *Brinegar v. United States,* supra; and *Coyne v. State,* supra; each deals with a search of a vehicle on a public highway. Petitioners are at a loss to determine what relevance those opinions have to the instant facts.

It is the position of the Petitioners that the search should never have been conducted without a search warrant. In order to search a person's dwelling without a warrant there must be consent, officer's responding to emergency, hot pursuit of a fleeing felon, goods in the process of destruction or goods in the process of being removed from the jurisdiction. *Vale v. Louisiana,* 399 U.S. 30 (1970) see also *Katz v. United States,* 389 U.S. 347 (1957) and *McDonald v. United States,* 335 U.S. 451 (1948).

The only possible argument that could be made is that goods were about to be removed from the jurisdiction. Such an argument is quickly answered by the superior weight that should be given to securing a warrant as compared to the slight inconvenience or delay of securing the premises in the meantime. *Taylor v. United States,* 286 U.S. 1 (1932). In *Taylor,* Mr. Justice McReynolds summarized by stating:

> Although over a considerable period numerous complaints concerning the use of these premises had been received, the agents had made no effort to obtain a warrant for making a search. They had abundant opportunity to do so and to proceed in an orderly way even after the odor had emphasized their suspicions; there was not probability of

material change in the situation during the time necessary to secure such warrant. Moreover, a short period of watching would have prevented any such possibility.

We think, in any view, the action of the agents was inexcusable and the seizure unreasonable. The evidence was obtained unlawfully and should have been suppressed. 286 U.S. at 6. See also *Chapman v. United States,* 365 U.S. 610 (1961); *Johnson v. United States,* supra.

Further, in order for a warrantless search to be justified, the probable cause supporting it must meet the requirements of the two-prong test set forth in *Aguilar v. Texas* 378 U.S. 108 (1964). See *Spinelli v. United States* 393 U.S. 410 (1969). *Aguilar* requires that there be some underlying circumstances from which the informant concluded that the contraband was where he claimed before probable cause was established to justify issuing a search warrant. As stated in *Ker v. California* 374 U.S. 23 (1963):

. . . It goes without saying that in determining the lawfulness of entry and the existence of probable cause we may concern ourselves only with what the officers had reason to believe *at the time of their entry. Johnson v. United States,* 333 U.S. 10, 17, 68 S. Ct. 367, 370, 371, 92 L. Ed. 436 (1948). As the Court said in *United States v. DiRe,* 332 U.S. 581, 595, 68 S. Ct. 333, 339, 93 L. Ed. 210 (1948), "A search is not to be made legal by what it turns up. In law it is good *or bad* when it starts and does not change character from "what is dug up subsequently. (emphasis the Courts') 374 U.S. at 40-41, n 12.

It is clear from the facts that the officers began the search when they entered the Petitioners' property and approached the house. It was after this point that corroboration of the informant's sparse information occurred. Under these facts, the reasoning of *Draper v. United States* 358 U.S. 307 (1959), allowing corroboration to supply the necessary elements to establish probable cause, does not apply. This would require the search to be justified by what it

produced which cannot be allowed. *Sibron v. New York* 392 U.S. 40 (1938); *Johnson v. United States* 333 U.S. 10 (1948). Therefore, being left with only the conclusions given by the informant, insufficient facts existed to establish probable cause to search. *Spinelli v. United States* 393 U.S. 410 (1969).

The "open fields" Doctrine of *Hester v. United States* 265 U.S. 57 (1924) does not serve to justify the search conducted by the officers. The DPS officer was first contacted by an unnamed informant and then went to the property to begin the search based on the tip. After entering the property and approaching the farmhouse and truck, the officers began making their way through the heavy foliage surrounding the farmhouse. It was during their approach that they first made the observations of what they believed was marijuana. When the officers trespassed solely to unearth evidence of a crime, they had no right to be in the position to have that view. *United States v. Holmes* 521 F2d 859 (5th Cir. 1975). As stated in Holmes by the Fifth Circuit Court of Appeals sitting en banc:

Whatever precautions a homeowner in an urban area might have to take to protect his activity from the senses of a casual passerby, a dweller in a rural area whose property is surrounded by extremely dense growth need not anticipate that Government agents will be crawling through the underbrush by putting up signs warning the Government to keep away. 521 F2d at 870.

The search beginning with the officers approaching the house, all other products of the illegal search equally require suppression as "fruit of the poisonous tree". *Wong Sun v. United States,* 371 U.S. 471 (1963); *Silverthorne Lumber Co. v. United States* 251 U.S. 385 (1929). All of the evidence seized pursuant to the illegal search of Appellant's residence and property should have been suppressed from being introduced into evidence at trial. The

protection of the Fourth Amendment being applicable to state searches through the "due process" clause Fourteenth Amendment. *Mapp v. Ohio* 367 U.S. 643 (1961).

CONCLUSION

The decision of the Texas Court of Criminal Appeals is based upon an interpretation of law that is not in accord with the decisions of this Court. Further, the instant case involves issues not precisely determined by this Court. For these reasons, supported by the argument set forth above, Petitioners respectfully submit that a Writ of Certiorari should issue to review the Judgment and opinion of the Court of Criminal Appeals for the State of Texas.

Respectfully submitted

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1200 Main Street
Dallas, Texas 75202
Counsel For Petitioners

CERTIFICATE OF SERVICE

I hereby certify that three (3) copies of this Petition for Writ of Certiorari were mailed, postage prepaid, to the Honorable John Hill, Attorney General, Capitol Station, Austin, Texas, 78711 on the 15th day of Nov., 1976.

Frank S. Wright

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Counsel For Petitioners

APPENDIX A

CARLA McKINNEY OCHS, Appellant
NO. 52,491 v. Appeal from
THE STATE OF TEXAS, Appellee Ellis County

JAMES CONNOR OCHS, JR., Appellant
NO. 52,492 v. Appeal from
THE STATE OF TEXAS, Appellee Ellis County

OPINION

Appeals are taken from convictions for possession of more than four ounces of marihuana. Appellants were tried jointly before the court upon pleas of not guilty. Punishment was assessed at three years in each case.

Appellants contend that the court erred "in admitting into evidence State's Exhibits 1A, 1B, 1C, 2, 3 and 12 (the marijuana), all of which had been seized as the result of an unlawful search."

Narcotics officer Green of the Department of Public Safety received a call in Dallas about 10:45 a.m. on October 17, 1974, from a confidential informant who had "three or four times" previously given him information "concerning narcotics investigations and information involving people in narcotic traffic" that "turned out to be correct." The informant advised Green that a white male named Michael was fixing to pick up a large amount of marihuana in a green Ford pickup from a yellow house near Bristol in Ellis County. Green and officer Demick drove to Bristol, where Green again met with the informant, and "he [informant] ran this story down to me again." As a result of the conversation, Green and Demick began surveillance of a

yellow frame house on "rural or farm land" near Bristol. Shortly after the officers arrived, Green observed Carla Ochs [appellant] "leave the residence holding a large amount of marihuana stalks which appeared to me to be marihuana stalks." Green stated that he was able to form an opinion that the stalks were marihuana from three years of experience in observing same. A white male was next observed leaving the residence with three brown paper sacks which were placed in the cab of a green and white Ford pickup. The officers approached the pickup, where "we could clearly see that it was a green plant substance in the brown paper sacks which appeared to us to be marihuana . . . ." The man, later identified as one Michael Hanson, entered the house and, before the officers could knock on the door of the house, Hanson opened the door and the officers observed "another shopping bag in the living room of the residence which contained what appeared to me to be marihuana." The bag in the house, along with the bags in the pickup, were seized and the contents of same were determined to be marihuana. In addition, a small quantity of marihuana was found near the front steps of the house and a patch of marihuana plants was discovered in the yard.

While the search is warrantless, the standards applicable to determining whether the facts of a case support an officer's probable cause assessment at the time of the challenged arrest and search are at least as stringent as the standards applied when receiving the decision of a magistrate. Whiteley v. Warden, Wyoming Penitentiary, 401 U.S. 560, 91 S.Ct. 1031, 28 L.Ed.2d 306 (1971); Truitt v. State, 505 S.W.2d 594. Appellants concede that the second prong of the test set forth in Aguilar v. Texas, 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723, that the reliability of the informer be shown by sufficient underlying circumstances, has been met.

Appellants urge that the requirement of *Aguilar* that there must be some underlying circumstances shown from which the informant concluded that the contraband was where he claimed it was has not been met.

The State responds by urging that the facts upon which the search and seizure are based are similar to those in Draper v. United States, 358 U.S. 307, 79 S.Ct. 329, 3 L.Ed.2d 327. As in *Draper,* sufficient details were furnished to enable the officers to verify much of the information related by the informer. The information supplied by the informer was ample in detail to allow adequate corroboration of its trustworthiness and enable the officers to conclude that the informer spoke with personal knowledge or had gained his information in a reliable way. See Almendarez v. State, 460 S.W.2d 921; Buitron v. State, 519 S.W.2d 467.

Appellants urge that the *Draper* line of cases is not applicable in that the officers in the instant case obtained the information which corroborated the informer as the result of an intrusion upon appellants' land. Appellants argue that appellants' home was in a wooded area and that the action of the officers in coming upon their property was an invasion of the appellants' reasonable expectation of privacy.

In United States v. Holmes, 521 F.2d 859 (5th Cir., 1975), cited by appellants, reversal resulted where a government agent entered upon defendant's rural property and peered into a hole in a shed for the purpose of securing evidence which would support issuance of a search warrant. The agent's action was not found to fall within the "open fields" exception. Appellants point to the following language in *Holmes:*

"Whatever precautions a homeowner in an urban area might

> have to take to protect his activity from the senses of a casual passerby, a dweller in a rural area whose property is surrounded by extremely dense growth need not anticipate that government agents will be crawling through the underbrush . . . ."

The "open fields" doctrine is discussed by the United States Supreme Court in Hester v. United States, 265 U.S. 57, 44 S.Ct. 445, 68 L.Ed. 898 (1924). In *Hester*, government agents concealed themselves "from fifty to one hundred yards" from defendant's house, where they observed defendant take a jug out of a car. Upon discovery of the officers, the defendant dropped the jug and ran. Examination of the jug by the officers revealed that it contained "moonshine whiskey." The Court held that even though the officers were on the defendant's land when they made the observations which led to the seizure of evidence, the evidence was not obtained by an illegal search or seizure, the court stating:

> ". . . the special protection accorded by the Fourth Amendment to the people in their 'persons, houses, papers and effects' is not extended to the open fields. The distinction between the latter and the house is as old as the common law. 4 Bl.Comm. 223, 225, 226."

Appellants reason that while the "open fields" doctrine may be applicable "if the search occurred in the West Texas plains," but by virtue of the growth surrounding appellants' home they had a reasonable expectation of privacy, an invasion of which is only warranted if based upon probable cause.

It is undisputed that the officers were on appellants' property when they made the observations which led to the seizure and arrests, Green testifying, "we were approximately fifty yards from the house when we noticed her [appellant Carla Ochs] walking toward us with the pile of what appeared to me to be marihuana stalks."

We need not decide whether the farmer whose home is on the plains of West Texas is subject to the "open fields" rule while his counterpart can remain in his house amidst the pine trees of East Texas immune from the surveillance of officers stationed in his fields.

Appellants' Exhibit 2, identified as a photograph of the appellants' property, is included in the record. Insofar as we are able to discern from viewing the exhibit, which appears to be an aerial photograph, there is a heavily wooded area on only one side of the house. Green testified in response to appellants' questions that you have "trouble in some places seeing very far off."

Even if the language in *Holmes* were binding on this Court and served to furnish the individual "surrounded by extremely dense growth" with a protective shield from the open fields doctrine, we cannot conclude that the evidence reflects that the home of appellants was situated in such an area.

In Atwell v. United States, 414 F.2d 136 (5th Cir., 1969), the defendant urged that evidence relative to a still found on his property 250 yards from the back of his house was not admissible as such evidence was obtained as the result of an unreasonable search and seizure. In rejecting such defense, the court stated:

> "But inasmuch as the protection of the Fourth Amendment against unreasonable searches and seizures does not extend to 'open fields,' there was no unreasonable search. See, e.g., Hester v. United States, 1924, 265 U.S. 57, 44 S.Ct. 445, 68 L.Ed 898; Monnette v. United States, 5th Cir. 1962, 299 F.2d 347. Moreover, even if the officers were trespassing on private property, a trespass does not of itself constitute an illegal search. Monnette v. United States, supra; United States v. Young, 4th Cir. 1963, 322 F.2d 443."

The facts surrounding the observations made approximately

fifty yards from the appellants' house are in sharp contrast to the peering into a shed on the defendant's premises in *Holmes* and the intrusion by government agents by electronic devices in Katz v. United States, 389 U.S. 347, 88 S.Ct. 807. We reject appellants' argument that the officers had made an intrusion in violation of appellants' Fourth Amendment rights at the point where they made the observations heretofore detailed. We conclude that the observations of the officers, coupled with the information from the reliable informer, furnished probable cause to conduct the search and seizure in question. Draper v. United States, supra; Almendarez v. State, supra; Buitron v. State, supra.

Appellants further urge, "Even if there was probable cause to search the property, the prosecution failed to show sufficient exigent circumstances to waive the requirement of a warrant." The information furnished by the informer did not ripen into probable cause until such information was corroborated by the observations of the officers. At this point in time, bags of what appeared to the officers to be marihuana were being placed in a pickup. It would have been impracticable to secure a search warrant since the pickup could be quickly moved out of the jurisdiction in which the warrant must be sought. Carroll v. United States, 267 U.S. 132, 45 S.Ct. 280, 69 L.Ed. 543; Brinegar v. United States, 338 U.S. 160, 69 S.Ct. 1302, 93 L.Ed. 1879; Coyne v. State, 485 S.W.2d 917.

Clearly, the officers had a right to enter the house and continue the search when they observed marihuana inside the house upon Hanson opening the door. Albro v. State, 502 S.W.2d 715.

See and cf. United States v. Watson, _____ U.S. _____, 96 S.Ct. 820, _____ L.Ed.2d _____ (1976); United States v. Santana, _____ U.S. _____, 96 S.Ct. _____, 49 L.Ed.2d 300 (1976).

We reject appellants' contention that the court erred in admitting the contraband into evidence.

Appellant James Ochs contends the evidence is insufficient to support the conviction finding him guilty of possession of marihuana.

Hanson, an accomplice witness as a matter of law, was called as a witness by the State and testified that he had gone to Dallas to see James Ochs relative to obtaining a job working in his art and antique shop. On the night prior to the day in question, Hanson went with James and Carla Ochs to their farm in Ellis County. Prior to leaving Dallas, James and Carla Ochs told Hanson that he could have some marihuana to carry back to Austin with him. Hanson and both of the Ochses smoked marihuana after they arrived at the farm. Hanson stated that James Ochs told him that ". . . he had marihuana there and he was growing it."

Appellant James Ochs points to the fact that Hanson was an accomplice witness and testimony showing that at the time when the officers entered the house on the day in question he [James Ochs] was in the bathtub and that there is no testimony from the officers relative to his handling or having any of the contraband in his possession. Appellant further calls our attention to testimony of Hanson that he was told that James and Carla Ochs were separated and that James was under a restraining order not to go on the property in question.

In Williams v. State, 524 S.W.2d 705, it was stated:

> "Possession of narcotics need not be exclusive and evidence which shows that the accused jointly possessed the narcotic with another is sufficient. Curtis v. State, Tex.Cr.App., 519 S.W.2d 883; Simpson v. State, Tex.Cr.App., 486 S.W.2d 807; Valdez v. State, Tex.Cr.App., 481 S.W.2d 904;

> Shortnacy v. State, Tex.Cr.App., 474 S.W.2d 713; Ochoa v. State, Tex.Cr.App., 444 S.W.2d 763. Mere presence at a place where narcotics or dangerous drugs are possessed does not in itself justify a finding of joint possession. Curtis v. State, supra; Valdez v. State, supra. The evidence must affirmatively link the accused to the contraband in such a manner that a reasonable inference arises that the accused knew of its existence and whereabouts. Curtis v. State, supra; Hineline v. State, Tex.Cr.App., 502 S.W.2d 703; Williams v. State, Tex.Cr.App., 498 S.W.2d 340."

When we eliminate the testimony of the accomplice witness Hanson, we find the following evidence of an incriminating nature tending to connect James Ochs with the possession of the contraband. See Cherb v. State, 472 S.W.2d 273; Bentley v. State, 520 S.W.2d 390.

The testimony of officer Green reflects that a bag of marihuana was found in the Ochses' house, marihuana was growing near the front steps of the house, and a "patch" containing marihuana plants was found in the yard. Carla Ochs was observed carrying marihuana stalks from the house and Hanson was observed carrying three bags of marihuana from the house and placing same into his pickup. The foregoing non-accomplice testimony clearly tends to connect appellant James Ochs with the offense and we conclude that such testimony, coupled with the testimony of the accomplice witness, was sufficient to sustain the conviction. See William v. State, supra.

The Judgments are affirmed.

DAVIS, Commissioner

(Delivered September 20, 1976)

(Opinion approved by the Court)

APPENDIX B

COURT OF CRIMINAL APPEALS OF TEXAS

CLERK'S OFFICE

Austin, Texas, Oct. 20, 1976

Dear Sir:

I have been instructed to advise that the Court has this day denied "Leave To File" the appellants' Motion for Rehearing in

Cause Nos. 52,491 & 52,492 Ochs & Ochs

vs.

THE STATE OF TEXAS Appellee.

Sincerely yours,

GLENN HAYNES, Clerk

APPENDIX C

THE STATE OF TEXAS

vs.

James Connor Ochs, Jr.

IN DISTRICT COURT OF Ellis County,

40th JUDICIAL DISTRICT OF TEXAS.

No. 13,407

September Term A.D. 1975

Date October 28, 1975

This day this cause was called for trial, and the State appeared by her County Attorney, and the Defendant, James Connor Ochs, Jr., having been duly arraigned, appeared in person, in open court, his counsel also being present, and both parties announced ready for trial; and it appearing to the Court that the Defendant, his counsel, and the State's attorney have agreed in writing in open court to waive a jury in the trial of this cause and to submit this cause to the Court; and the Court having consented to the waiver of a jury herein, the indictment was read, and the Defendant entered his plea of guilty thereto, and thereupon the said Defendant was admonished by the Court of the consequences of said plea, and the said Defendant persisted in his plea; and it plainly appearing to the Court that the Defendant is sane and that he is uninfluenced in making said plea by any consideration of fear, or by any persuasion, or delusive hope of pardon prompting him *to confess his guilt the said plea is by the Court received and here now entered of record upon the minutes of the court as the plea herein of said Defendant.

And the Court having heard all the evidence submitted for the State and the Defendant and argument of counsel is of the

opinion and so finds that the said Defendant is guilty of the offense of possession of marijuana on October 17, 1974.

And it appearing to the Court that the Defendant, his counsel, and the State's attorney have agreed in writing in open court to waive a jury and to submit the assessment of Defendant's punishment to the Court; and the Court having consented to the waiver of a jury herein, and after having heard all the evidence submitted for the State and the Defendant and argument of counsel the Court is of the opinion and so finds that the said Defendant's punishment should be *by confinement in the *Texas Department of Corrections for a term of three (3) years.

IT IS THEREFORE CONSIDERED AND ADJUDGED by the Court that the Defendant, James Connor Ochs, Jr., is guilty of the offense of possession of marijuana on October 17, 1974 as found by the Court, and that he be punished as found by the Court, that is *by confinement in the *Texas Department of Corrections for a term of three (3) years, and that the State of Texas do have and recover of the said Defendant *the amount of such fine, and all costs in this prosecution, for which execution may issue; and that the said Defendant be remanded to jail to await the further orders of the Court herein.

s/ MILTON HARTSFIELD
Judge 40th Judicial District of Texas

APPENDIX D

THE STATE OF TEXAS

vs.

Carla McKinney Ochs.

IN DISTRICT COURT OF Ellis County,

40th JUDICIAL DISTRICT OF TEXAS.

No. 13,406

September Term A.D. 1975

Date October 28, 1975

This day this cause was called for trial, and the State appeared by her County Attorney, and the Defendant, Carla McKinney Ochs, having been duly arraigned, appeared in person, in open court, his counsel also being present, and both parties announced ready for trial; and it appearing to the Court that the Defendant, his counsel, and the State's attorney have agreed in writing in open court to waive a jury in the trial of this cause and to submit this cause to the Court; and the Court having consented to the waiver of a jury herein, the indictment was read, and the Defendant entered his plea of guilty thereto, and thereupon the said Defendant was admonished by the Court of the consequences of said plea, and the said Defendant persisted in his plea; and it plainly appearing to the Court that the Defendant is sane and that he is uninfluenced in making said plea by any consideration of fear, or by any persuasion, or delusive hope of pardon prompting him *to confess his guilt the said plea is by the Court received and here now entered of record upon the minutes of the court as the plea herein of said Defendant.

And the Court having heard all the evidence submitted for the State and the Defendant and argument of counsel is of the

opinion and so finds that the said Defendant is guilty of the offense of possession of marijuana on October 17, 1974.

And it appearing to the Court that the Defendant, h's counsel, and the State's attorney have agreed in writing in open court to waive a jury and to submit the assessment of Defendant's punishment to the Court; and the Court having consented to the waiver of a jury herein, and after having heard all the evidence submitted for the State and the Defendant and argument of counsel the Court is of the opinion and so finds that the said Defendant's punishment should be *by confinement in the *Texas Department of Corrections for a term of three (3) years.

IT IS THEREFORE CONSIDERED AND ADJUDGED by the Court that the Defendant, Carla McKinney Ochs, is guilty of the offense of possession of marijuana on October 17, 1974 as found by the Court, and that he be punished as found by the Court, that is *by confinement in the *Texas Department of Corrections for a term of three (3) years, and that the State of Texas do have and recover of the said Defendant *the amount of such fine, and all costs in this prosecution, for which execution may issue; and that the said Defendant be remanded to jail to await the further orders of the Court herein.

s/ MILTON HARTSFIELD
Judge 40th Judicial District of Texas